Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1321

OM PRAKASH JAIN,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February, 1980

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PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Proceedings Below

The opinion of the Court of Appeals, so far unreported, was issued on December 21, 1979 and is appended hereto. The decision of the Board of Immigration Appeals, the decision of the Immigration Judge and that of the Immigration and Naturalization Service ("the Service"), constituting all of the administrative decisions in this case, are also appended hereto.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1). The date of the judgment sought to be reviewed is December 21, 1979. No rehearing has been sought in the Court of Appeals.

Questions Presented for Review

(i) whether the Court of Appeals had jurisdiction, pursuant to Section 106(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1105a(a) to review a decision of the Board of Immigration Appeals, denying petitioner's petition for adjustment of status to that of permanent resident pursuant to Section 245(a) of the Act, 8 U.S.C. Sec. 1255(a).

(ii) whether the decision of the Court of Appeals, for which no jurisdictional basis is set forth should not be vacated and the cause remanded to a Federal District Court for initial judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. Sec. 704 where jurisdiction would rest on Section 279 of the Immigration and Nationality Act, 8 U.S.C. Sec. 1329.

(iii) whether the Court of Appeals properly applied, in this case, the judicially created "preconceived intent to remain here permanently" standard to the otherwise deceptively brief statutory requirements of Section 245(a), assuming, without asserting, that the Court of Appeals had jurisdiction to review, initially, a decision of the Board of Immigration Appeals denying petitioner's petition for adjustment of status to that of permanent resident.

STATUTES AND REGULATIONS CITED

Immigration and Nationality Act of 1952, as amended

Section 101(a)(15)(B), 8 U.S.C. Sec. 1101(a)(15)(B)

The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens— * * *

(B) an alien * * * having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure; * * *

Section 106(a), 8 U.S.C. Sec. 1105a(a)

Judicial Review of orders of deportation and exclusion.

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that—

Time for filing petition

(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.

Venue

(2) the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this chapter, of the petitioner, but not in more than one circuit;

Respondent; service of petition; stay of deportation

(3) the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration

and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs:

Determination upon administrative record

(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive; * * *

Section 106(c), 8 U.S.C. Sec. 1105a(c)

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. * * *

Section 212(a)(14), 8 U.S.C. Sec. 1182(a)(14)

Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences and arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled

or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 203(a)(3) and (6) and to nonpreference immigrant aliens described in section 203(a)(8);

Section 212(a)(19), 8 U.S.C. Sec. 1182 (a)(19)

Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States by fraud, or by willfully misrepresenting a material fact;

Section 214(b), 8 U.S.C. Sec. 1184(b)

Every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 101(a)(15).

Section 241 (a), 8 U.S.C. Sec. 1251(a)

Any alien in the United States, (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

Apprehension and Deportation of Aliens.

Section 242(b), 8 U.S.C. Sec. 1252(b)

A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. • • •

Section 245 (a), 8 U.S.C. Sec. 1255(a)

The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

Section 248, 8 U.S.C. Sec. 1258.

Change of Nonimmigrant Classification.

The Attorney General may, under such conditions as he may prescribe, authorize a change from any nonimmigrant classification to any other nonimmigrant classification in the case of any alien lawfully admitted to the United States as a nonimmigrant who is continuing to maintain that status, except an alien classified as a nonimmigrant under paragraph 15(D) of section 101(a), or an alien classified as a nonimmigrant under paragraph 15(C) of section 101(a) unless he applies to have his classification changed from a classification under paragraph 15(C) to a classification under paragraph 15(A) or 15(G) of section 101(a).

Section 279, 8 U.S.C. Sec. 1329.

Jurisdiction of District Courts.

The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this title. • • •

Administrative Procedure Act, 5 U.S.C.

Section 702. Right of Review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. • • •

Section 703. Form and venue of proceeding.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute, or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibition or mandatory injunction or habeas corpus, in a *court of competent jurisdiction.* • • •

Section 704. Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. • • •

Code of Federal Regulations, 8 C.F.R.

Section 212.8(b).

Aliens not required to obtain labor certifications. The following persons are not considered to be within the pur-

view of Section 212(a)(14) of the Act and do not require a labor certification: * * * (4) an alien who establishes on Form I-526 that he has invested, or is actively in the process of investing, capital totalling at least $40,000 in an enterprise in the United States of which he will be a principal manager and that the enterprise will employ a person or persons in the United States who are United States citizens or aliens lawfully admitted for permanent residence, exclusive of the alien, his spouse and children.

(Note: the minimum capital to invest was raised to $40,000 from $10,000 on December 23, 1976, 41 F.R. 55850).

Adjustment of Status to that of Persons Admitted for Permanent Residence

Section 245.2(a)(4). Decision.

The applicant shall be notified of the decision and, if the application is denied, of the reasons therefor. No appeal shall lie from the denial of an application by the district director but such denial shall be without prejudice to the alien's right to renew his application in proceedings under Part 242 of this chapter. An application for adjustment of status under section 245 of the Act as a preference or nonpreference alien shall not be approved until an immigrant visa number has been allocated by the Department of State.

Change of Nonimmigrant Classification.

Section 248.3(d). Denial of application.

When the application is denied, the applicant shall be notified of the decision and of the reasons therefor and of his right to appeal in accordance with the provisions of Part 103 of this chapter.

Statement of the Case

Om Prakash Jain, petitioner here ("Jain") is a native and citizen of India. In January, 1976, Jain entered the United States on a nonimmigrant business visa good for four months. On February 13, 1976 Jain applied to the Service for the adjustment of his status to that of permanent resident alien.

Two years later, on March 24, 1978, infra, p. 22a, the Service denied Jain's application by administrative action. The decision was the result of an "office interview" which had been given to Jain at the Service's offices in New York City.

Under Service regulations, 8 C.F.R. 245.2(a)(4), no administrative appeal from the denial was possible. The Service informed Jain that he was required to depart by April 24, 1978 failing which "proceedings would be instituted to enforce (his) departure". The Service did not notify Jain that such "proceedings" would be deportation proceedings pursuant to Section 242 of the Act. Following the language of the regulations, the decision also notified Jain that in the course of such "proceedings" Jain would be able to "renew" his application for status as a permanent resident. As this implied that Jain could invoke further administrative remedies, Jain did not seek judicial review in a Federal District Court of the Service's decision. Indeed, Section 106(c) of the Act specifically precludes judicial review unless all administrative remedies have been exhausted. In sum, the Service as much as invited Jain not to depart by holding out the possibility that he may "renew" his application for adjustment in "proceedings to enforce (his) departure", infra 24a.

The deportation proceedings pursuant to Section 242 were held before an Immigration Judge who issued his

decision, infra, p. 17a, disagreeing, in part, with the Service decision. In effect, the Immigration Judge sat in review of the Service decision. The Judge found that Jain had "a preconceived intention to remain here permanently" when he had entered the United States in February, 1976, and that this factor precluded the grant of the relief sought. The statute, Section 245, does not make adjustment of status to permanent resident dependent on an alien's state of mind at the time of applying for admission as a non-immigrant. Nor do the extensive regulations thereunder, 8 C.F.R. Part 245 mention anywhere that factor as precluding the grant of the relief sought.

On administrative appeal to the Board of Immigration Appeals, the Immigration Judge's decision was sustained on his finding as to Jain's alleged state of mind in February, 1976. The Board held that this finding supported "the discretionary denial of adjustment of status". At the same time, the Board ordered that Jain be deported, unless he departed voluntarily. Because of this alternative order of deportation, Jain petitioned the Court of Appeals to review the Board's decision ordering him deported, invoking the Court of Appeals' jurisdiction under Section 106(a). Jain raised two main points which were addressed in the opinion of the Court of Appeals:

first, that nowhere in Section 245 or in the regulations thereunder is an alien's state of mind at the time of entry as a nonimmigrant ("preconceived intent to remain here permanently") made a condition precedent to the grant of the relief sought and that this factor has been engrafted upon the statute by administrative decisions and by conflicting judicial decisions;

second, that the lack of a direct administrative or judicial review of the Service decision was a denial of due process since it had forced Jain into a deportation proceeding before an Immigration Judge.

The Court of Appeals denied the "petition for the review of decision of the Board of Immigration Appeals denying petitioner's application for adjustment of status under Section 245 of the (Act), 8 U.S.C., Section 1255", infra, p. 2a. On Jain's motion, the Court of Appeals has stayed its mandate as provided by Rule 41(b) of the Federal Rules of Civil Procedure. This petition for certiorari has followed.

Reasons for the Allowance of the Writ

1. This Court has never addressed "the deceptively brief statutory requirements of Section 245 (which) nonetheless pose complex administrative problems", infra, p. 6a. Thus, the Court of Appeals has decided an important question of Federal law that should be decided by this Court, since, as the court below noted

> "we are content to adopt the majority view espoused in *Ameeriar* v. *Immigration and Naturalization Service,* 438 F. 2d 1028 (3rd Circ., 1971), knowing full well that in this area Congress legislates frequently and can correct us if we are wrong".

Even if, as a result of the Court of Appeals' decision, Congress would legislate in this area in order to resolve the conflict between the Circuits, such legislation would not do Jain any good, since he has been ordered deported.

2. The decision of the Court of Appeals does not state the jurisdictional basis upon which it purports to rest and neither does the majority decision of the *Ameeriar* court. The Court of Appeals expressly stated that it was reviewing "a decision of the Board of Immigration Appeals which denied (Jain's) application for adjustment of status under Section 245", infra, p. 2a.

Section 106(a) nowhere confers upon a Court of Appeals jurisdiction to review, initially, a decision of the Board

denying adjustment of status. The Court of Appeals for the Third Circuit has so held in *Scalzo* v. *Hurney,* 314 F. 2d 675, and in *Lan Mau Chi* v. *Bouchard,* 314 F. 2d 664.

Jurisdiction to review final administrative action in Section 245 proceedings should rest with a Federal District Court pursuant to the Administrative Procedure Act, 5 U.S.C. Section 704 and Section 279 of the Immigration and Nationality Act, 8 U.S.C. Sec. 1329. As had been done in *Scalzo,* the Court of Appeals should have transferred Jain's petition to a Federal District Court.

3. The Courts of Appeals are in conflict concerning a nonimmigrant alien's eligibility to seek adjustment of status as a permanent resident where the Service asserts the alien's "preconceived intention to remain permanently".

The District of Columbia Circuit, in *Brownell* v. *Carija,* 254 F. 2d 78 has held that even an alien in transit through the United States is eligible to apply for Section 245 relief. Another panel of the same court, in *Brownell* v. *Gutnayer,* 212 F. 2d 462, reached the same result. Concurring with this rationale, the three-judge minority in *Ameeriar* expressed similar views, assuming, as Judge Gibbons noted in his dissent at 1035, that the *Ameeriar* court had jurisdiction to decide the issue.

The conflict should be resolved by this Court without awaiting the action of Congress.

ARGUMENT

A comparison of the procedures prescribed by the Attorney General pursuant to two similar sections of the Act, Sections 245 and 248, will illustrate the basic unfairness of the deportation proceeding into which Jain was forced by the Service decision that promised him additional administrative remedies.

Section 245(a) of the Act, in issue here, is strikingly similar to Section 248. Unlike the regulations under Section 245, the regulations under Section 248, 8 C.F.R. 248.3 (d), expressly provide for an administrative appeal procedure in accordance with other parts of the regulations, 8 C.F.R. Part 103.

Thus, the nonimmigrant who is seeking a change in his nonimmigrant classification is not forced into deportation proceedings for the purpose of "renewing" his change-of-classification application. The administrative appeal procedure permits him to take an appeal to a Regional Commissioner of the Service. During the pendency of such an appeal, the nonimmigrant is not placed under deportation proceedings because jurisdiction over his case is then vested in the Regional Commissioner and not in the District Director who alone could commence deportation proceedings pursuant to Section 242.

If the administrative appeal is denied, the nonimmigrant can seek judicial review in a Federal District Court, *see e.g. Seihoon* v. *Levy,* 408 F. Supp. 1208 (M.D. La.), *Richards* v. *I.N.S.,* 554 F. 2d 1173 (App. D.C.).

Thus, the Attorney General's regulations pursuant to Section 248 are fair and consistent with the concept of due process, whereas the regulations pursuant to Section 245 are unfair and conducive to the "complex administrative problems" cited by the Court of Appeals.

CONCLUSION

The judgment of the Court of Appeals should be vacated and the cause remanded to a Federal District Court for initial judicial review of the Service decision denying Jain's application for adjustment of status to that of permanent resident of the United States.

Respectfully submitted:

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 437—September Term, 1979.

(Argued November 7, 1979
Decided December 21, 1979.)

Docket No. 79-4138

OM PRAKASH JAIN,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Before:

FEINBERG and MANSFIELD, *Circuit Judges,* and
MISHLER, *Chief District Judge.**

Petition for review of decision of the Board of Immigration Appeals denying petitioner's application for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255.

Denied.

PETER HIRSCH, New York, NY (Antonio C. Martinez, New York, NY, of Counsel), *for Petitioner.*

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* Honorable Jacob Mishler, Chief Judge of the Eastern District of New York, sitting by designation.

THOMAS H. BELOTE, Special Assistant United States Attorney, New York, NY (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Michael H. Dolinger, Assistant United States Attorney, of Counsel), *for Respondent.*

FEINBERG, *Circuit Judge:*

Om Prakash Jain, a citizen of India in this country on a nonimmigrant business visa, petitions for review of a decision of the Board of Immigration Appeals, which denied his application for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255. The Board based its denial, in the exercise of its discretion, on a finding that petitioner entered the United States with a preconceived intent to remain permanently in this country. Petitioner's principal claim is that this is an improper reason for denying relief under section 245. For reasons given below, we reject this contention, along with petitioner's other arguments. We therefore deny the petition for review and affirm the decision of the Board.

I

The facts, as they appear in the record before us, may fairly be summarized as follows. This is petitioner Jain's third stay in the United States. The first began in June 1974, when he was 23 years old and was admitted on a nonimmigrant visa as a visitor for business. Jain had obtained that visa as the proprietor and business representative of a company located in Jaipur, India, which exported gems, beads and semi-precious stones. Jain remained here for four to five weeks looking for customers, but left without success. A little over a year later, Jain

returned in the same capacity as before, and again found no customers. After staying in this country a month, Jain again departed. While he was here, however, Jain apparently conceived the idea of creating a company within the United States to import beads and jewelry from India and keep an inventory here. This would allow Jain to guarantee quick delivery to potential customers, thus overcoming the difficulty he had earlier encountered in seeking to sell his goods. Before he left this country on this second visit, Jain retained an attorney, created a new import company supposedly located in the room at the hotel where he stayed, filed a certificate of doing business under the assumed name of Asian Imports and obtained a social security number for himself.

Upon his return to India, Jain quickly liquidated his export firm in Jaipur by turning it over to his brother. Thereafter, he reentered the United States in January 1976 on a nonimmigrant business visa good for four months, as the representative of his former export business. The true reason for his return, however, was to run Asian Imports, his newly established enterprise here. Within a month, Jain also applied to the Immigration and Naturalization Service for adjustment of his status to that of permanent resident alien. The basis of the application was his alleged status as an investor, a term of art in this context more fully described below.

Two years later, the District Director of the Service denied Jain's application for adjustment of status because of his lack of good faith in applying for his nonimmigrant visa abroad. After Jain failed to depart voluntarily, the Service began deportation proceedings. Before an immigration judge, Jain conceded his deportability, but again sought adjustment of status as an investor and, in the alternative, applied for reinstatement of voluntary depar-

ture status.[1] After a hearing, the immigration judge held in August 1978 that Jain did not qualify as an investor and, alternatively, that even if he did, his application would be denied on discretionary grounds because Jain last entered this country with a preconceived intent to remain permanently. On appeal, the Board in July 1979 affirmed the decision of the immigration judge on the second, discretionary ground, and granted Jain again the privilege of voluntary departure. Jain's petition to us for review allows him to enjoy the automatic stay of deportation that accompanies such action, 8 U.S.C. § 1105a(a)(3), and almost four years have now elapsed since Jain's entry in January 1976 on a four-month business visa.

II

Before discussing the main issue on appeal, it is helpful to examine briefly the relevant statutory framework. The Immigration and Nationality Act (the Act) distinguishes between two groups of entering aliens—the immigrant and the nonimmigrant. The immigrant seeks entry on a permanent basis as a resident. Prior to entry, an immigrant must obtain an immigrant visa at a consular office abroad. Such visas are divided into various preference categories and since the number of immigrant visas available during one year is limited for certain categories, immigrant visas are issued in chronological order to qualified applicants. See 1A C. Gordon & H. Rosenfield, Immigration Law and Procedure § 3.4a.

[1] Section 244(e) of the Act, 8 U.S.C. § 1254(e), authorizes the Attorney General, in his discretion, to grant voluntary departure to an alien who is otherwise subject to deportation. An alien who is granted voluntary departure avoids the stigma of deportation and is allowed to choose his destination. Furthermore, future reentry into the United States is considerably easier for an alien who has departed voluntarily than for one who has been expelled.

The Act presumes that entering aliens seek to do so as immigrants. Consequently, nonimmigrants—those aliens seeking entry only for a limited time and purpose—bear the burden of demonstrating to the United States consular officials abroad and the immigration authorities in this country that they are bona fide nonimmigrants. 8 U.S.C. §§ 1184, 1361. Jain, like many nonimmigrants, obtained entry under a nonimmigrant visa for business. Such a visa allows an alien to conduct business in the United States for a foreign employer for a limited period. 8 C.F.R. 214.2 (b). However, in order to establish his bona fide nonimmigrant status and thereby qualify for such a visa, a nonimmigrant is required to demonstrate to the satisfaction of the immigration authorities that he has a foreign residence that he has no intention of abandoning and that he will depart voluntarily at the end of his authorized stay. 8 U.S.C. § 1101(a)(15)(B).

Under earlier versions of the Act, nonimmigrant aliens who sought to adjust their status to that of immigrants were required to leave the country and seek reentry as immigrants. To ameliorate this hardship, the Immigration and Naturalization Service devised an administrative procedure, known as pre-examination, under which nonimmigrant aliens were examined by immigration officials in the United States and were issued an immigrant visa by the consular office in Canada if their admissibility as immigrants was established. See 2 C. Gordon & H. Rosenfield, supra, § 7.3a. This procedure was used extensively for many years.[2] In 1952, Congress enacted section 245 of the

[2] The Service processed over 45,000 pre-examination cases from 1935 to 1950. Sofaer, The Change of Status Adjudication: A Case Study of the Informal Agency Process, 1 J. Legal Studies 349, 351 (1971).

Act, 8 U.S.C. § 1255, to obviate the need for the pre-examination procedure. The current version of the statute provides in pertinent part:

> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

Thus, a nonimmigrant alien may now adjust his status to that of an immigrant without leaving the country if he is admissible for permanent residence and is eligible for an immigrant visa, which is "immediately available" to him. However, even if the nonimmigrant satisfies these express statutory requirements, the Service has discretion under section 245 to deny the application for adjustment of status. Furthermore, the alien bears the burden of persuading the Service to exercise its discretion favorably, since adjustment of status under section 245 is considered to be extraordinary relief. See 2 C. Gordon & H. Rosenfield, supra, § 7.7d.

The deceptively brief statutory requirements of section 245 nonetheless pose complex administrative problems. One major obstacle facing section 245 applicants is to demonstrate that an immigrant visa is "immediately available." The law governing the availability of visas is complicated, and if a nonimmigrant cannot establish an exemption from the numerical limitations applicable to certain categories

of immigrant visas, he must await the chronological distribution of such visas. Furthermore, certain categories of immigrant visas are unavailable unless the applicant either obtains a certification from the Secretary of Labor that his employment in this country will not affect the American labor market adversely or establishes an exemption from this certification requirement. Jain apparently was eligible only for this type of visa and therefore attempted to establish an exemption from the certification requirement as an investor in a domestic enterprise. The investor exemption, at the time Jain applied, allowed waiver of the certification requirement if the alien had invested over $10,000 in an enterprise that he managed and that directly created domestic job opportunities. Mehta v. Immigration and Naturalization Service, 574 F.2d 701 (2d Cir. 1978). While Jain's investment in Asian Imports apparently satisfied the requisite amount, the immigration judge found that Jain was ineligible for the investor exemption because his enterprise had "failed to expand job opportunities for anyone in this country." Relying on the authority of *Mehta*, supra, the judge therefore found that Jain had failed to demonstrate that an immigrant visa was "immediately available." Although this determination of statutory ineligibility seems amply supported by the record, the Board of Immigration Appeals affirmed the denial of section 245 relief on the second rationale offered by the immigration judge—that Jain's application did not warrant a favorable exercise of discretion. We now turn to this issue.

III

The immigration judge ruled that even if Jain were "statutorily eligible" for adjustment of status, relief would be denied as a discretionary matter. Because Jain had

already liquidated his business in India and made plans to operate Asian Imports in this country, the judge concluded that Jain had "not been candid" with the immigration authorities when he last entered the country on a nonimmigrant visa for business and that his application presented no "outstanding or unusual equities" warranting a favorable exercise of discretion. The Board of Immigration Appeals adopted this ground for decision, holding that the evidence supported "the immigration judge's conclusion that [Jain] entered the United States with a preconceived intent to remain permanently" and that such a finding would support a discretionary denial of status adjustment.

Petitioner now argues that his preconceived intent to remain permanently in this country after entering on a temporary nonimmigrant visa was an improper basis for denying discretionary relief. The issue is an important one, and apparently has not been addressed in a published opinion of this court. However, a number of other circuits have considered whether the good faith of an alien's entry as a nonimmigrant is a proper consideration in the exercise of discretion under section 245.[3] The most extensive discussion of the issue is by the Third Circuit, sitting en banc in Ameeriar v. Immigration and Naturalization Service, 438 F.2d 1028 (3d Cir. 1971). Both the majority opinion and the dissent of Judge Gibbons rely heavily upon the legislative history of section 245, although their interpretations differ. The original version of section 245 enacted in 1952 to replace the pre-examination procedure authorized the Attorney General, through the Service, to grant relief

[3] See, e.g., Faddah v. Immigration and Naturalization Service, 553 F.2d 491, 495 (5th Cir. 1977); Soo Yuen v. Immigration and Naturalization Service, 456 F.2d 1107 (9th Cir. 1972) (per curiam); Chen v. Foley, 385 F.2d 929, 935-36 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968).

"under such regulations as he may prescribe to insure the application of this paragraph solely to the cases of aliens who entered the United States in good faith as nonimmigrants." 66 Stat. 217. Therefore, good faith entry as a nonimmigrant was apparently regarded as a condition precedent to the favorable exercise of discretion. This requirement was deleted in the 1960 amendments to the Act in order to enlarge the Service's discretion to act favorably on behalf of nonimmigrants who were otherwise eligible for admission as immigrants. S. Rep. No. 1651, 86th Cong., 2d Sess. (1960), reprinted in 1960 U.S. Code Cong. & Admin. News 3124, 3146-47. See generally 2 C. Gordon & H. Rosenfield, supra, § 7.7a. However, the Service thereafter took the position that the absence of good faith entry, even though no longer a statutory bar to section 245 relief, was nonetheless a factor relevant to the favorable exercise of discretion. See Sofaer, The Change of Status Adjudication: A Case Study of the Informal Agency Process, 1 J. Legal Studies 349, 374-76 (1972). The majority in *Ameeriar*, as well as the other circuits that have considered the issue, adopted this view.

While most authority thus strongly supports the position taken by the Service here, the arguments of the dissenters in *Ameeriar* cannot be lightly dismissed. In a typically thorough and forceful opinion, Judge Gibbons, joined in dissent by then Chief Judge Hastie and Judge Aldisert, argued that a preconceived intention to remain in the United States was an improper discretionary basis for denying adjustment of a nonimmigrant's status unless the alien had also intended to circumvent quota restrictions. On this view, which relief heavily on legislative history, apparently relief could be denied for this reason only if the alien obtained a nonimmigrant visa in bad faith because

he was ineligible for an immigrant visa quota number. Since there was apparently no quota restriction applicable to the Afghanistanian petitioners in *Ameeriar,* the dissenters believed that denial of section 245 relief was an abuse of discretion.[4]

While the statutory question is not free from doubt, we nonetheless believe that the majority view is more persuasive. Although the legislative history relied on by the dissenters in *Ameeriar* is not without force, it is at best ambiguous. In support of his narrow reading of the proper grounds for denying discretionary relief, Judge Gibbons cited the Senate Report accompanying the 1960 amendments to section 245, which noted that adjustment of status was available to those nonimmigrant aliens who enter "without any intention of circumventing quota restrictions." S. Rep. No. 1651, supra, 1960 U.S. Code Cong & Admin News at 3147. However, the same Senate Report also notes that the Act requires that the nonimmigrant alien seeking section 245 relief enter "in good faith" and without the intent to circumvent "any other law relating to immigration." Id. Thus, the legislative history of section 245 also offers some support for the Service's position that the good faith entry of a nonimmigrant is relevant to the favorable exercise of discretion under that provision.

Furthermore, allowing the Service the discretion to deny section 245 relief to nonimmigrant aliens who enter in bad faith appears to comport with the proper administration of

[4] Judge Freedman, in a separate dissenting opinion joined by Chief Judge Hastie, would have vacated the Service's order because the Attorney General's delegation of his power to the Board was "invalid because he failed to designate any policy objectives or standards, or even relevant factors to guide those he authorized to act in his name." 438 F.2d at 1041. Cf. similar criticism in Sofaer, supra, at 372. Petitioner has not made such an argument here.

the statute. As previously noted, the Act distinguishes between immigrants and nonimmigrants and specifically requires those seeking nonimmigrant status to establish that they have no intention of abandoning their foreign residence and that they will depart voluntarily at the end of their authorized stay. We do not know whether Jain would have received an immigrant visa had he applied for one in India with a true statement of his intent. But had the true facts been known, he clearly would not have received a nonimmigrant visa because he would not have been entitled to one. Jain did not seek entry into the United States to represent a foreign employer for a limited period; he instead sought entry to remain permanently and to run his own business here. To require the Service to disregard this misrepresentation by Jain would effectively undercut the Act's requirement that nonimmigrants demonstrate their bona fide status. In contrast, permitting the Service to deny section 245 relief based on the nonimmigrant's lack of good faith protects the integrity of the consular procedures established by the Act.[5]

Finally, it should be noted that denial of section 245 relief, when coupled with a grant of voluntary departure,

[5] The majority opinion in *Ameeriar* put it well:

> It should be remembered that any alien who applies for a nonimmigrant visa must, as required by statute, . . . demonstrate to the satisfaction of the American consul in his home country and to the immigration officials upon his arrival in the United States that he fully intends to return to his home country. Therefore, absent an administrative error, any alien who arrives in the United States with the fixed intention to remain permanently has misrepresented his intention to the immigration authorities. An applicant who has thus misled immigration officials in an attempt to circumvent established procedures presents a weak case for the favorable exercise of the Attorney General's discretion.

438 F.2d at 1033 n.6.

is a lenient disposition of what might possibly be regarded as fraud. Although denied an adjustment of status, Jain is not precluded from seeking entry as an immigrant through the normal process established by the Act. Since the Service alternatively might have attempted to exclude Jain permanently under section 212(a)(19) of the Act, 8 U.S.C. § 1182(a)(19), on the ground that he obtained his nonimmigrant visa through fraud, we find the Service's resort to the far less drastic remedy of denying section 245 relief to be a preferable disposition. Cf. Lee v. Immigration and Naturalization Service, 446 F.2d 881 (9th Cir. 1971) (per curiam).

Thus, we are content to adopt the majority view espoused in *Ameeriar,* knowing full well that in this area Congress legislates frequently and can correct us if we are wrong. On this reading of section 245, it is clear that the Board's decision was not an abuse of discretion. The immigration judge characterized Jain as not "candid" in his dealings with the immigration authorities when he reentered the United States on his nonimmigrant business visa. We find that the record supports such a conclusion. Furthermore, Jain's application presented no unusual equities. There were no close family ties in this country and Jain did not show that compliance with normal immigration procedures would cause a severe hardship.

IV

Jain also argues on appeal that he was denied due process because he was unable to appeal the original denial of his section 245 application directly and could only do so in the context of deportation proceedings. We find this argument to be without merit. Although the regulations do preclude a direct administrative appeal from the denial by a district director of a section 245 application, 8 C.F.R.

§ 245.2(a)(4), the alien is entitled to a de novo review of his application in the context of deportation proceedings. Id. We consider this dual opportunity to present a section 245 application to provide ample process, particularly in light of the discretionary nature of section 245 relief. The fact that the second consideration of the application takes place within the context of a deportation proceeding is irrelevant. Petitioner's argument to the contrary assumes that Jain could have avoided deportation proceedings simply by chosing not to renew his section 245 application. However, since Jain's deportability as an overstay was clear, the initiation of deportation proceedings was a matter over which he had no control.

Accordingly, the petition for review is denied.

Appendix

UNITED STATES DEPARTMENT OF JUSTICE

Board of Immigration Appeals

Washington, D.C. 20530

JUL 10 1979

[SEAL]

File: A21 077 388—New York

In re: Om Pakrash *Jain*

In Deportation Proceedings

Appeal

On Behalf of Respondent:
Jack Sachs, Esquire
401 Broadway
New York, NY 10013

On Behalf of I&N Service:
George W. Masterton
Appellate Trial Attorney

Oral Argument: June 27, 1979

Charge:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2))—Nonimmigrant visitor for business—remained longer than permitted

Application: Adjustment of status

The respondent has appealed from the decision of an immigration judge, dated August 23, 1978, finding him deportable as charged and denying his application for adjustment of status as an investor. The appeal will be dismissed.

The respondent is a 28-year-old native and citizen of India who last entered the United States as a nonimmigrant

Appendix

visitor for business on January 13, 1976. At a deportation hearing held on August 23, 1978, the respondent conceded deportability under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), as a nonimmigrant who remained in the United States beyond the period of his authorized stay. The only issue on appeal involves the immigration judge's denial of the respondent's application for adjustment of status.

The respondent filed his adjustment of status application as an investor exempt from the labor certification requirement of section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14), under 8 C.F.R. 212.8(b). In his decision denying his application, the immigration judge purported to find the respondent ineligible for adjustment both on statutory grounds and as a matter of discretion. We need not reach the question of statutory eligibility in this case, however, as we find that the respondent has not established that he merits adjustment of status as a matter of discretion.

An alien who applies for the discretionary relief of adjustment of status bears the burden of showing why administrative discretion should be favorably exercised. *Matter of Blas,* Interim Decision 2485 (BIA 1974; A.G. 1976), *aff'd, Blas* v. *INS,* 556 F.2d 586 (9 Cir. 1977) (table). In the present case, the immigration judge found that the respondent had entered the United States on January 13, 1976 as a nonimmigrant business visitor with a preconceived intent to remain permanently.

The respondent entered the United States in June, 1974 and September, 1975 in connection with a business he started in India in 1969 (Tr. p. 20). He stated that these two trips were not very successful and that the idea occurred to him to start a business in the United States under the name of Asian Imports so that he could import mer-

chandise and guarantee delivery to his United States customers (*id.*). When he returned to the United States in January, 1976, the respondent had already given up his business in India. He admitted that he entered the United States at that time to "run" Asian Imports (Tr. p. 24), for which he had obtained a business certificate in October, 1975. Ex. 5.

We find that this evidence supports the immigration judge's conclusion that the respondent entered the United States with a preconceived intent to remain permanently. *See generally Matter of Shaw,* Interim Decision 2525 (BIA 1976). Such a finding supports the discretionary denial of adjustment of status and, accordingly, we will dismiss the respondent's appeal on that basis. In accordance with our decision in *Matter of Chouliaris,* Interim Decision 2572 (BIA 1977), we will grant the respondent 30 days voluntary departure.

Order: The appeal is dismissed.

Further Order: The respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order and under such conditions as the District Director deems appropriate; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

David L. Milhollan
Chairman

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
IMMIGRATION COURT

File: A21 077 388—New York, N.Y. Dated: August 23, 1978

In the Matter of

Om Pakrash JAIN

—Respondent—

IN DEPORTATION PROCEEDINGS

Charge:

Section 241(a)(2) I&N Act—nonimmigrant visitor for business remained longer.

Application:

Adjustment of status to permanent resident—I&N Act Section 245 (8 U.S.C. 1255 and in the alternative voluntary departure

In Behalf of Respondent	In Behalf of Service
Jack Sacks, Esq.	William Jankun, Esq.
401 Broadway	Trial Attorney
New York, N.Y. 10013	New York, N.Y. 10007

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a single male alien aged 27, a native and citizen of India, who last entered the United States on January 13, 1976, as a visitor for business, authorized to stay until April 24, 1978. He remained thereafter without authority and conceded his deportability from the United States. He designated India as the country of deportation. He asked that he not be deported from the United States

but be permitted to adjust his status in the United States as a permanent resident by virtue of the fact that he has invested more than $10,000. in a gem and jewelry business. In the alternative, he seeks voluntary departure.

In order to fulfill the statutory requirements for the benefits of Section 245, the respondent has the burden of establishing (8 C.F.R. 242.17) that he is eligible to receive an immigrant visa which is immediately available to him and is admissible to the United States for permanent residence. The Government questions the latter point in that it believes the respondent entered the United States with a preconceived intent to continue in a business he had already started prior to his last entry. On March 24, 1978, (Exhibit 2) the Immigration and Naturalization Service denied his application for that reason. However, it did not go into the question of statutory eligibility.

The respondent seeks adjustment of status in the United States as a nonpreference alien which waives, as an investor, (8 CFR 212.8(b)(4) the labor certification requirements of Section 212(a)(14) of the Act. Based on the evidence presented, I am satisfied that there was a $10,000. investment in a gem and jewelry business. I don't believe this is disputed.

8 C.F.R. 242.8(a) and 242.17 provide that an Immigration Judge has the independent authority to determine an application for adjustment of status under Section 245 of the Act. 8 C.F.R. 212.8(b) dated December 5, 1973, and in effect at the time this application was first considered provided in part that an alien establish on form I-526, which is in evidence as Exhibit 2, that he is seeking to enter the United States for the purpose of engaging in a commercial enterprise in which he has invested or is actively in the process of investing capital totalling at least $10,000. 8 C.F.R. 242.2(a)(4) permits the respondent to "renew" his

application before an Immigration Judge after an administrative denial. Since there is no question with respect to the $10,000. investment, there is only one issue to determine with respect to statutory eligibility. The Board of Immigration Appeals in *Matter of Ruangswang* (Interim Decision 2546 decided December 27, 1976), held that an investor to qualify as such must expand job opportunities in the United States.

The respondent in the instant case has been operating his business in this country from February, 1976, to the present time without any employees, other than the period from January, 1978 to the present when he hired a part-time U.S. citizen employee, until July 15, 1978, when he was hired on a full time basis at a salary of $3.00 an hour. In evidence are copies of checks paid to this employee (Exhibit 4) showing a net pay for a period of four weeks in the sum of $112.74. The unaudited financial statements which are part of Exhibit 3, indicate that the respondent made a net profit of $3,901.17 in 1976 and $7,641.96 for the year 1977. Considering the fact that the respondent's salary would have to come from these profits, he was unable to pay for any employee during the first two years of the operation of the business. The question is whether the business, which now shows a profit of $9,440.63 for the first seven months of this year is sufficient to warrant a full time employee. If so, a finding could be made that he is expanding job opportunities in the United States. I find to the contrary. The respondent had been able to operate his business alone for a period of almost two and a half years with only part time help during the last six months of that period.

Based on the evidence I find that the respondent can continue to operate his business solely with part-time help. Therefore, he has failed to comply with the requirement

of the Board set forth in *Matter of Ruangswang,* supra. The reason for the Board's finding was that the respondent was engaged in full time employment requiring a labor certification. That decision was reached based on 8 C.F.R. 212.8(b)(4) prior to its amendment of October 7, 1976, which adds the following, ". . . the enterprise will employ a person or persons in the United States who are United States citizens or aliens lawfully admitted for permanent residence, exclusive of the alien, his spouse and children . . ." The respondent under the interpretation of the amended regulation or under the current regulation has failed to expand job opportunities for anyone in this country. Therefore, his statutory eligibility as an investor is not established. See *Nehta vs. I&NS* 574 F2nd 701 (2nd circuit 1978).

Assuming arguendo, statutory eligibility in this case, there is a serious issue as to whether the respondent came to the United States as a bona fide nonimmigrant on January 13, 1976. On advice of counsel, not his lawyer who is representing him in this case, he obtained a business certificate in the name of Asian Imports, which is the name of the business he is conducting today on October 3, 1975. The respondent indicated that he was in the United States twice before. He first came to this country on June 27, 1974, stayed four or five weeks to export certain gems and jewelry, which business he was conducting in India. He was unsuccessful and returned to India. He came back to the United States in September, 1975 for a three or four week business trip, but claimed little success. He brought with him at that time merchandise in the amount in a safe deposit box. At approximately the same time he obtained the business certificate in the name of Asian Imports.

When he returned to the United States in January of 1976, he claimed to be a nonimmigrant visitor for business. He intended to continue in the business of gems and jewelry in this country under the name of Asian Imports. When the respondent returned on January 13, 1976, he had already sold his interest in his gem and jewelry business to his brother in India, and his intention was to remain in the United States to continue his business here. In February of 1976, a month after his arrival, the respondent paid a fee of $500. to Mr. Sacks, his current lawyer, to arrange to stay in this country to do business here. (See Exhibit 6) Under the circumstances, even if the respondent were statutorily eligible for adjustment of his status, he would be ineligible as a matter of discretion for such relief because the Board held in *Matter of Arai* 13 I&N 494 that if there are adverse factors in the case, they must be offset by outstanding or unusual equities. In this case the respondent has not been candid, and has presented no such equities for me to consider. There being no opposition to the privilege of voluntary departure, such relief will be granted.

ORDER: IT IS ORDERED that the application for adjustment of such status being the same hereby is denied.

IT IS FURTHER ORDERED: That in lieu of an order of deportation the respondent be granted voluntary departure without expense to the Government under such terms and conditions as the District Director shall direct.

IT IS FURTHER ORDERED: That if the respondent fails to depart when and as required the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective. The respondent shall be deported from the United States to India.

/s/ HOWARD I. COHEN
Howard I. Cohen
Immigration Judge

Appendix

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE
26 Federal Plaza
New York, N.Y. 10007

File Copy

Om Prakash Jain
244 West 99th Street, Room 436
New York, N.Y. 10025

Refer In this File No.
A 21 077 388
Date: March 24, 1978

DECISION ON APPLICATION FOR STATUS
AS PERMANENT RESIDENT

Upon consideration, it is ordered that your application for status as a permanent resident be denied for the following reasons:

You are a single, 27 year old male, born January 10, 1951 at Jaipur, India and a citizen thereof. You last entered the United States at New York on January 13, 1976 as a visitor for business until April 15, 1976. You neither applied for nor were granted any extension of your temporary admission.

On February 13, 1976 you submitted an Application for Status as Permanent Resident accompanied by a Request for Determination that Prospective Immigrant is an Investor, (Form I-526,) in a company, Asian Imports. You submitted various documents to support your claimed eligibility for the exemption of the requirements of a labor certification pursuant to section 212(a)(14) of the Act. Form I-526 indicates you were the proprietor of the company, Gopinath Shyamlal, 229 Haldiyon Ka Rasta, Jaipur, India, which company dealt with the manufacture and export of jewelry and semi-precious stones. You have indicated you had been the proprietor of said concern from

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1969 until December, 1975. Among the sundry documents furnished, is a Xerox copy of a Business Certificate dated October 3, 1975 indicating your personal appearance on the aforementioned date before a New York City Notary at which time you affixed your signature to such Business Certificate.

The record indicates you obtained your B-1 visitor for business visa on August 27, 1975 in Jaipur, India as the proprietor of a concern in Jaipur. You have presented copies of checks submitted by you as evidence of your investment. They bear dates of January 13, 1975, January 16, 1976, January 20, 1976, and January 23, 1976. Also presented was Xerox copy of Sales Invoice dated January 28, 1976 addressed to Asian Imports from your firm in Jaipur, India covering purported sale of gems and beads in the sum of $668.27 (listed in Form I-526 as your initial stock of imported semi-precious stones). Your last entry occurred on January 13, 1976 at which time you were admitted until April 15, 1976 for the purpose of conducting business for your firm in Jaipur.

From the foregoing, it is concluded that you have not dealt in good faith with the American Consul in New Delhi when you applied for a non-immigrant business visa nor with this Service when you applied for admission as a visitor for business for your firm in India. Record establishes you had already made arrangements to go into business in the United States prior to your last entry here.

In *the Matter of Arai,* 13 I.&N. Dec. 494, it has been held that where adverse factors are present in a given application for adjustment of status under section 245 of the Act, as amended, it may be necessary for the applicant to offset these by a showing of unusual or even outstanding equities.

Appendix

Since you have not shown that you have any unusual or outstanding equities that should influence a decision in your favor, your application is denied as a matter of discretion.

You are granted to April 24, 1978 to effect your departure from the United States voluntarily, without the institution of proceedings to enforce your departure. You must notify this office before that date on the enclosed card (Form I-458) of the arrangements you have made to depart from the United States. *At the time of your departure from the United States, do not fail to surrender Form I-94. Arrival-Departure Record, in accordance with the instructions on that form.*

If you fail to depart from the United States by the date specified, proceedings will be instituted to enforce your departure. You may renew your application for status as a permanent resident during such proceedings.

Sincerely yours,

cc: Jack Sachs, Esq.
401 Broadway
New York, NY 10013

District Director

Enclosure(s)

I-438
M-188